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HAROLD B. WILLEY,

In the Supreme Court of the United States

October Term, 1954

No. [redacted] 57

BRIDAL VEIL LUMBER COMPANY,
Petitioner.

vs.

UNION PACIFIC RAILROAD COMPANY,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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October Term, 1954

No.----------

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIDAL VEIL LUMBER COMPANY,
Petitioner.

vs.

UNION PACIFIC RAILROAD COMPANY,
Respondent.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered January 3, 1955, and confirmed upon rehearing March 8, 1955, reversing the judgment of the District Court of the United States for the District of Oregon rendered April 14, 1953.

OPINIONS BELOW

The Oral Opinion of the District Court, given March 24, 1952, is set forth in Appendix A of this petition.

The Opinion of the Court of Appeals, dated January 3, 1955 is not yet reported, and is appended hereto as Appendix B. The Opinion of the Court of Appeals on the Petition for Rehearing, dated March 8, 1955, is not yet reported and is set forth in Appendix C.

BASIS OF JURISDICTION

The Opinion and Judgment of the United States Court of Appeals for the Ninth Circuit were filed January 3, 1955; petition for rehearing was timely filed by petitioner, and an Opinion and Order denying the petition for rehearing were filed March 8, 1955.

Application for stay of mandate pending the application for writ of certiorari in this Court was made March 9, 1955, and an order staying the mandate of the Court of Appeals for the Ninth Circuit until April 7, 1955, pending the application for writ of certiorari in this Court was entered March 9, 1955. Application for extension of stay of mandate was made April 1, 1955, and an order extending the stay of mandate until May 2, 1955, was entered April 1, 1955.

Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED

Respondent railroad, (herinafter called "railroad") brought this action against petitioner industry (hereinafter called "industry") seeking indemnity under a spur track agreement for damages it was required to pay one of its employees for personal injuries. Each party charged the other with negligence in several particulars. Special findings on each specification of negligence alleged were submitted to the jury, but the trial court, at railroad's request, charged them that they did not have to make findings on any specification of negligence about which they could not agree. Railroad did not object to such charge. The jury returned its findings that railroad was negligent in six particulars as charged, and that railroad negligently caused or directly contributed to the accident. The jury further found that industry was not negligent in six of the seven particulars alleged, and left unanswered one such question. The Court of Appeals reversed on the sole ground that no finding was made on this issue, and ordered a new trial of all issues.

1. Does Rule 51 of the Federal Rules of Civil Procedure preclude railroad from assigning as error the failure of the jury to find on one issue, because it failed to object to the instruction which procured it?

Petitioner contends that the decision of the Court

of Appeals in permitting this assignment of error to be raised creates a conflict among the circuits on an important question of federal law.

2. The trial court entered judgment in favor of industry on the verdict of the jury, and found that industry was not negligent. Did the Court of Appeals err in holding:

a. That the trial court could not reconcile the answers of the jury on the other issues with the failure to answer the particular issue?

b. That the finding of the jury that railroad's negligence was the cause of the accident and the refusal of the jury to find that any negligence of industry caused the accident did not amount to a general verdict against railroad?

c. That the failure to make a finding was not a finding against respondent who had the burden of proving that issue?

d. That if a new trial was required, the issues upon which the jury was able to reach an agreement must also be retried?

Petitioner contends that the combination of the foregoing holdings amounts to a destruction of the functions and purposes of the special verdict as provided by Rule 49(a) of the Federal Rules of Civil Procedure

by relegating it to its status under common law as a procedural trap. When considered all together, the net effect on the workability of the special verdict is so serious as to present an important question of federal procedure which should be settled by the Supreme Court.

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

No statutory or constitutional provisions are involved in the instant case. The following provisions of the Federal Rules of Civil Procedure are involved:

Rule 49 (a)

"SPECIAL VERDICTS. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand

the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accordance with the judgment on the special verdict."

Rule 51

"INSTRUCTIONS TO JURY: Objection. ". . . No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

STATEMENT OF THE CASE

Railroad served industry by a spur track. (R., 10). On March 14, 1946, a railroad employee was injured in a collision between a railroad car on which he was working and a lumber carrier (known as a "hyster") operated by industry. (R., 12). Subsequently, the employe brought an action against railroad under the Federal Employers' Liability Act and recovered a judgment for $20,000 plus costs, which was eventually satisfied by railroad on June 15, 1948, by the payment of $21,850. The railroad, upon being sued, had tendered the defense of the action to industry which denied liability. (R., 12-13).

The Proceedings in the District Court

On March 23, 1949, railroad instituted this action against petitioner in the United States District Court

for the District of Oregon. Jurisdiction was based upon diversity of citizenship. Plaintiff is a Utah corporation, defendant is a Delaware corporation doing business in Oregon, and the amount in controversy exceeds three thousand dollars, to-wit, $21,850. (R., 9).

The railroad alleged that the injury to its employee was caused by the negligence of industry, and asserted that it was entitled to be indemnified either for all or half the amount paid by it (R., 14-17) under the provisions of a contract between the parties which provided that if either party was solely or primarily responsible for the accident, it would bear the entire cost, and if both were jointly negligent, each would bear one-half thereof, (R., 148). This interpretation of the contract was adopted by both the District Court (R., 131, Appendix A, p. 24) and the Court of Appeals, (R., 164-166, Appendix B, p. 39) and is not in issue herein.

The issues thus made by the pleadings and the pretrial order were tried before the Honorable Gus J. Solomon, District Judge, and a jury, and at the instance of railroad, (R., 116) were submitted to the jury in the form of a special verdict under Rule 49(a). The verdict required the jury to answer 18 questions, seven inquiring whether industry was negligent in each of the particulars charged by the railroad, nine inquiring whether railroad was negligent in each of the particu-

lars charged by the industry, and the other two inquiring whether any negligence of either was the cause of the accident. (R., 31-33, Appendix D).

In the course of his charge to the jury, the court advised them that they must answer all the questions submitted to them. (R., 95-96). To this, railroad objected, stating that if the jury answered any question regarding negligence of a particular party in the affirmative, there was no necessity for them to answer any of the other questions regarding negligence of that party. (R., 116, 124). The court then further instructed the jury that if they could not agree upon any of the questions either in the affirmative or the negative, they need not answer such questions. (R., 125-126). To this, railroad made no objection.

The jury returned its verdict which found railroad negligent in six particulars, and that its negligence caused or directly contributed to the accident. They found industry not negligent in six of the seven particulars, but were unable to agree upon an answer to the question whether industry failed to keep a proper lookout. Having found no negligence of industry, the jury made no answer to the question whether its negligence contributed to the accident. (R., 31-33; the verdict of the jury is set forth in full in Appendix D.)

The District Judge, after motions for mistrial, (R.,

33) and for a judgment notwithstanding the verdict or a new trial (R., 36) entered judgment in favor of industry on April 14, 1953 (R., 71) making a conclusion of law (R., 70) that:

> "The sole proximate cause of the injuries to 'railroad company's' employee and 'railroad company's' loss arising therefrom was the result of 'railroad company's' own negligence and did not result through any negligence on the part of the defendant. This conclusion is according to the verdict of the jury on the negligent issues as received and entered herein."

The Decision of the Court of Appeals

Railroad prosecuted an appeal to the Court of Appeals for the Ninth Circuit, which found the trial below free of reversible error (R., 156-167, Appendix B) except that "the disagreement of the jury on one vital issue left a gaping hole in the special verdict." (R., 164, Appendix B, p. 38). Accordingly it reversed the judgment of the District Court and remanded the case for a new trial on all issues. (R. 167, Appendix B, p. 42). Industry filed a petition for rehearing, which was denied. (R., 169, Appendix C).

ARGUMENT

Question 1.

There are numerous decisions of the Courts of Appeal upholding the doctrine of Rule 51 that the giving of

an instruction cannot be assigned as error for the first time on appeal unless the instruction was specifically objected to, and the trial court given an opportunity to correct his error. See, e.g., **Bolan v. Lehigh Valley R. Co.,** 167 F. 2nd 934, 937 (C.C.A. 2, 1948); **Biggins v. Hajoca Corp.,** 185 F. 2d 982, 986 (C.A. 3, 1950); **New York Life Ins. Co., v. Schlatter,** 203 F. 2d 184, 188 (C.A. 5, 1953); **Hoag v. City of Detroit,** 185 F. 2d 764, 766 (C.A. 6, 1950); **Steuber v. Admiral Corp.,** 171 F. 2d 777, 780 (C.A. 7, 1949); **Louisville & Nashville R. Co., v. Botts,** 173 F. 2d 164, 169 (C.A. 8, 1949); **Grand River Dam Authority v. Thompson,** 118 F. 2d 242, 245 (C.C.A. 10, 1941). The present decision holds that the verdict is insufficient, but ignores the fact that it was the instruction of the court which permitted the jury to omit the finding on any issue on which they could not agree. Neither upon the original hearing nor upon rehearing did the Court of Appeals consider industry's argument under Rule 51. By permitting railroad to attack the instruction under the guise of attacking the verdict which was the natural result of it, the Court of Appeals circumvents the requirements of Rule 51 and sets up a conflict between its ruling and the holdings in the other circuits that an instruction not properly objected to will not be considered upon appeal. The Courts should be bound by this rule as well as the parties and failure to enforce it in this case makes a mockery of the rule.

Moreover, the instant decision is in direct conflict with the holding of the Court of Appeals for the Fifth Circuit in **Garland v. Lane-Wells Co.,** 185 F. 2d 857 (C.A. 5, 1950) on the precise question here involved. In that case, the jury by special findings found plaintiff-appellant's injuries to have been the result of unavoidable accident and did not answer the issues submitted to them on negligence and contributory negligence. Appellant insisted that despite the finding of unavoidable accident, he was entitled to findings on the negligence issues and his appeal took the form of an objection to the verdict. The Court of Appeals refused to consider the objection to the alleged insufficient verdict because of the failure of appellant to object to the instruction of the District Court which told the jury that if they found the injuries to have been the result of unavoidable accident, they should not make findings on the other issues.

Similarly, in this case, the court advised the jury if they could not agree on any issue, that, rather than attempting to resolve their differences, they should omit that issue. Railroad failed to object to that instruction. It is precluded by Rule 51 from raising the insufficiency of the verdict.

The requirement of Rule 51 is the most basic precept of appellate jurisdiction; that the appellate court will

not consider error which was not brought to the attention of the trial court. The present decision involves a serious inroad upon that principle in that it appears to hold that an erroneous verdict can be assigned as error upon appeal, even though it is the direct and natural result of an instruction to which no objection was made. The Fifth Circuit has held to the contrary, and the conflict of opinion upon this important issue should be resolved by this Court.

Question 2.

Although this question appears to involve several distinct problems, petitioner believes that, considered together, they all present different aspects of the same important question of federal procedure — Is the special verdict to be the workable instrument of justice which the authors of Rule 49(a) intended, or is it to fall back into its common law status as a procedure involving so many hazards as to be utterly worthless? In petitioner's opinion, the instant decision is a throwback to the vices of the special verdict under common law and lessens the utility of the special verdict to a point at which will be virtually useless in the Ninth Circuit, and that this impairment of the functions of an important rule of federal procedure presents an important question of federal law which this Court should settle.

Rule 49(a), as stated in the Commentaries on the Rule in Title 28, U.S.C.A., Federal Rules of Civil Procedure, Rules 17 to 51, p. 483, is designed to eliminate the procedural technicalities surrounding the special verdict at common law, which made its use extremely hazardous. The desirability of special verdicts, and the intention of Rule 49 to facilitate their use has been frequently commented upon. (See, e.g., **Pacific Greyhound Lines v. Zane,** 160 F. 2d 731, 737 (C.C.A. 9, 1947); **Skidmore v. Baltimore & O. R. Co.,** 167 F. 2d 54, 70 (C.C.A. 2, 1948); **Cate v. Good Bros.,** 181 F. 2d 146, 148 (C.A. 3, 1950). The present decision, however, fails to interpret the Rule in such a way as to encourage the special verdict, and in fact, overrides the laudable attempt of the trial court liberally to interpret the Rule to accomplish its purposes.

The jury found that industry was not negligent either in failing to keep the hyster under control, or in failing to apply the hyster brakes properly, or in permitting the hyster to come down the ramp and collide with the railroad car, or in turning the hyster so as to collide with the railroad car. It failed to agree on whether or not industry was negligent in failing to keep a proper lookout. (R., 31-33, Appendix D). The trial judge entered judgment in favor of industry and made a finding that industry was not negligent. (R., 70-71). In effect, this represents his considered conclusion that

if industry was not negligent in the respects indicated, it could not have failed to keep a lookout under the evidence presented. The Court of Appeals, without any transcript of testimony before it, presumes to substitute its judgment for that of the trial judge, and holds that "lookout" was a different issue from the others, on the ground that the trial judge submitted it as a different issue, and that the jury apparently considered it to be different. (R., 164, Appendix B, p. 38).

Even assuming that the trial court's submission of "lookout" as a separate issue indicated that he then considered it as such, his entry of judgment and his finding that industry was not negligent represent his conclusion upon mature consideration that it was not a distinct issue. He may have been wrong in this respect, but it is difficult to understand how the Court of Appeals can so conclude in the absence of the testimony.

The record demonstrates, however, that in submitting the special verdict, the court did not attempt to define the issues himself, but merely incorporated into the verdict the various specifications of negligence with which each of the parties charged each other in the pre-trial order. (R., 15-16, 19-20). Merely because a party alleges repetitious and overlapping specifications of negligence, it is not incumbent upon the court to hold that they are necessarily different, or that a

negative answer to one does not preclude an affirmative answer to another.

The fact that the jury may have considered them different does not mean that the trial court was in error in his finding, which in effect withdrew from their consideration the issue on which they did not make a finding. Again, this may have been error, but the Court of Appeals cannot so find without having the evidence before it.

"Reconciliation of the jury's various responses should be sought, and accepted wherever possible, to achieve a harmonious result," **Morris v. Pennsylvania R. Co.,** 187 F. 2d 837 (C.A. 2, 1951). The Court of Appeals should not upset the trial court's attempt to follow this liberal rule of interpretation, without better reason than here appears.

The trial court's decision can be explained on another ground. The jury found that railroad was negligent, and answered "yes" to the question:

> "If you find that plaintiff, Union Pacific Railroad Company, was negligent in any of the respects mentioned in Section III, did such negligence cause or directly contribute to, the accident and the resultant injury to Daniel W. Fagan?"

It furthermore refused to make a similar finding

with respect to industry. This decision amounted to a general verdict against railroad, and the trial court was justified in accepting it as such despite the failure of the jury to answer one of the special issues. For all that the Court of Appeals knew, there may have been no evidence whatsoever to justify the submission of the issue of "lookout." Industry so argued at the time of the submission of the verdict. (R., 120). The fact that the trial court submitted it, in the absence of the record, should not be permitted to override the fact that he later saw fit to enter judgment and make a finding of no negligence.

Once again, the purposes of Rule 49(a) to avoid the procedural pitfalls of the common-law special verdict, and the attempt of the trial judge to rule in accordance with those purposes have been circumvented by the decision herein.

Furthermore, the inability of the jury to agree on the issue of "lookout" amounts to a finding that railroad failed to carry the burden of proving that issue. **Daube v. Philadelphia & R. Coal Co.,** 77 Fed. 713, 715 (C.C.A. 7, 1897); **United States v. Harris,** 77 Fed. 821 (C.C.A. 7, 1897); **Schioler v. Secretary of State,** 175 F. 2d 402, 403 (C.A. 7, 1949). This rule too, accords with the purposes of Rule 49(a) to prevent procedural

hazards from destroying verdicts which should set an end to the case.

Finally, industry contends that the Court of Appeals in remanding this case for a new trial upon all issues, instead of just the issues relating to industry's negligence, demonstrates its misconception of the nature and purposes of special verdicts. As stated by Professor Sunderland in what Judge Jerome N. Frank has called a "brilliant article," (**Morris v. Pennsylvania R. Co.,** 187 F. 2d 837, 843 (C.A. 2, 1951):

> "The general verdict is either all wrong or all right, because it is an inseparable and inscrutable unit. A single error completely destroys it. But the special verdict enables errors to be localized so that the sound portions of the verdict may be saved and only the unsound portions be subject to redetermination through a new trial."
>
> "Verdicts, General and Special,"
> 29 Yale L.J. 253, 259 (1920).

Judge Charles E. Clark, not an enthusiastic supporter of special verdicts, has described this function of preserving portions of the verdict as the "purpose and best achievement" of this procedural device. **Morris v. Pennsylvania R. Co.,** supra, at p. 841.

If a retrial must be held, the only purpose of retrying the issue of railroad's negligence will be to permit the second jury to **decide** both sides of the question,

not merely to **look** at both sides, as the Court of Appeals states. (R. 171, Appendix C, p. 44). If the jury is to consider the entire situation, apply its conception of what the law ought to be and return what is in its opinion a "just" verdict, "inseparable and inscrutable," as it does with a general verdict, this is a reasonable objective. But as Judge Frank points out, the special verdict is designed precisely for the purpose of limiting such "juriesprudence," (See **Skidmore v. Baltimore & O. R. Co.,** 167 F. 2d 54, 59 (C.C.A. 2, 1948) by confining the jury to fact-finding, and leaving the application of the law to the facts to the judge, who is presumably better qualified for the task. Whether or not one agrees with this objective, there can be no question but that Rule 49(a) was designed to accomplish it.

The only basis for choice of the second verdict over the first is that the first jury was unable to agree on a different issue. Petitioner submits that if the sole purpose of the jury is to find the facts, this does not constitute a reason for rejecting a unanimous finding, after a trial free of error, that railroad's negligence contributed to the accident. If this were the ordinary case of contributory negligence, rather than one of indemnity, such a finding would be conclusive, irrespective of the failure of the jury to find on other issues. The facts are the same; only the legal rules differ. If

the jury is to find facts, why should its finding not be equally good in both cases?

In petitioner's opinion, the only relevant factor in choosing between the two verdicts is the relative accuracy of their fact-finding. Which is more likely to be accurate, a jury which heard the facts of a 1946 acident in 1950, or one which will hear the witnesses' versions in 1955, or possibly 1956? The question answers itself.

Suppose that the second jury should unanimously agree that industry was or was not negligent, but that they are unable to agree concerning the negligence of respondent. Is the case to be retried in toto a third time, in 1958, despite the fact that all issues will have been determned? The prevention of just such incongruities is, in Judge Clark's phrase, the "purpose and best achievement" of the special verdict. The instant decision is important not only in appellate courts, but to nisi prius jurisdiction in the consideration of motions for new trals. If permitted to stand, it will lead to continual relitigation of already decided issues.

Taken all together, petitioner submits that the effect of the decision of the Court of Appeals is so serious a departure from the intentions of the authors of Rule 49(a) as to impair its functioning in the Ninth Circuit The Rule, as previously mentioned, is an attempt to

encourage a certain type of procedure. If the instant decision is permitted to stand, its effect will be to discourage that procedure to the point where it will be discarded. The emasculation in this manner of an important provision of the Federal Rules of Civil Procedure presents an important question of federal law which this Court should determine.

Respectfully submitted,

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PHILIP A. LEVIN,
of Counsel.

APPENDIX "A"

In the District Court of the United States
For the District of Oregon
Civil Action No. 4395

UNION PACIFIC RAILROAD COMPANY, a corporation, Plaintiff,

vs.

BRIDAL VEIL LUMBER COMPANY, a corporation, Defendant.

ORAL OPINION
March 24, 1952

I am of the opinion that the defendant is entitled to a judgment in this case.

During the trial, the plaintiff withdrew its specification of negligence No. 7 which alleged that the defendant was negligent in maintaining its buildings and structures closer than 8 feet 6 inches to the center line of the track. Thereafter the remaining issues were submitted to the jury upon special interrogatories. The jury found that the plaintiff was negligent in many particulars and that its negligence caused or contributed to the accident and the jury also found that the defendant was not negligent in any respect, except that the jury was unable to agree on an answer to one of the specifications of negligence asserted by the plaintiff against the defendant.

I have heretofore ruled that the verdict was legally sufficient and have denied plaintiff's motions for a directed verdict and for a new trial.

At the time of the hearing on the remaining issues, certain exhibits were introduced. On the basis of such exhibits and admitted facts set forth in the pretrial order, I have come to the conclusion that, in view of the finding of the jury, the plaintiff may prevail only in the event that Sections V and XI of the lease agreement between plaintiff and defendant cover losses caused solely by the negligence of the plaintiff. In my opinion, these sections, standing alone or when construed with other portions of the lease and the industry track contract between plaintiff and defendant and particularly Section IX thereof of the industry track contract, clearly indicate that the parties did not intend that the plaintiff should be indemnified for losses occasioned by its own negligence. Southern Pacific Co. v. Layman 173 Ore. 275, 145 P. 2d 295.

The provisions relating to the division of the damages are applicable only in the event of joint and concurring negligence. Plaintiff contends that the defendant breached its contract with the plaintiff in that the defendant maintained buildings and structures within a distance closer than 8½ feet from the center line of the railroad track and that the maintenance of such

buildings or structures caused or contributed to the accident and injury of Daniel W. Fagan. This contention is practically identical to the specification of negligence asserted against defendant which was withdrawn on plaintiff's own motion at the trial on the negligence issues. The evidence showed that these buildings and structures had been constructed and maintained long prior to the time defendant acquired them; that the plaintiff knew of their existence at the time it entered into the lease and industrial track agreements and that it permitted defendant to maintain them without objection. In view of such fact and in the absence of any evidence that the buildings and structures did, in fact, cause or contribute to the accident, I am of the opinion that the provision relating to the division of damages may not be invoked.

Counsel for defendant shall prepare appropriate Findings of Fact, Conclusions of Law, and a Judgment in favor of the defendant.

APPENDIX "B"

United States Court of Appeals
For the Ninth Circuit

UNION PACIFIC RAILROAD COMPANY,
a corporation,
Appellant,

vs.

BRIDAL VEIL LUMBER COMPANY,
a corporation,
Appellee.

No. 13,879
Jan. 3, 1955

Appeal from the United States District Court,
District of Oregon

Before: HEALY, POPE, and CHAMBERS, Circuit Judges

CHAMBERS, Circuit Judge

This is a diversity case of two corporations, citizens of different states. Union Pacific was plaintiff in the trial court and is appellant here. Bridal Veil Lumber Company, defendant and appellee, operates a lumber mill at Bridal Veil, Oregon. The mill is on land leased from the Union Pacific and it is served by a spur track of the railroad.

On March 14, 1946, a Union Pacific engine was switching freight cars on the spur track. Daniel W. Fagan, a brakeman, was on one of the cars and was participating in the switching movement in the regular course of his employment by Union Pacific.

As the cut of cars on which Fagan was riding approached the private railroad crossing of Bridal Veil, a lumber company employee came down a ramp from the mill (the ramp is parallel to the spur track) driving a lumber carrier known as a hyster and swung it on to the crossing in front of the oncoming cars. Fagan had been riding the lead car on a ladder on the side. However, just before the car collided with the hyster, Fagan had moved around the corner of the car and was on a ladder at the end of the car at the time of impact and he was injured in the collision.

Fagan pursued his employer, Union Pacific, in the courts of California, under the Federal Employers' Liability law, and recovered a verdict and judgment for $20,000. That story will be found in Fagan v. Union Pacific RR., 85 Cal. App. 2d 583, 139 P. 2d 776. Upon being sued by Fagan, Union Pacific tendered the defense to Bridal Veil. The latter declined to defend. Whatever total Fagan's judgment had reached when it was satisfied, Union Pacific secured some small discount from Fagan when it paid him $21,850 in full settlement. Bridal Veil agreed with Union Pacific that the compromise would not prejudice whatever rights the railroad had against the lumber company. So the case is before this court as if Fagan's judgment was for $21,850.

After paying Fagan, Union Pacific commenced this action against Bridal Veil to recover alternatively all or half of the payment.

Union Pacific grounds its claim for whole or partial indemnity upon two documents: The plant site lease dated October 6, 1942, and the industry track contract dated May 14, 1937. The lease is a renewal of a previous five year lease which had been executed simultaneously with the spur track contract. The prior lease has not appeared haec verba at any time in this litigation.

Pertinent language in the lease is as follows:

> "That the Lessee shall hold harmless the Lessor and the leased premises from any and all liens, fines, damages, penalties, forfeitures or judgments in any manner accruing by reason of the use or occupation of said premises by the Lessee; and that the Lessee shall at all times protect the Lessor and the leased premises from all injury, damage or loss by reason of the occupation of the leased premises by the Lessee, or from any cause whatsoever growing out of said Lessee's use thereof."

And indemnity is covered in the industry track contract with this:

> "The Industry also agrees to indemnify and hold harmless the Railroad Company for loss, damage or injury from any act or omission of the Industry, its employees or agents, to the person or property of the parties hereto and their employees and agents, and to the person or property of any other

person or corporation, while on or about the Track; and if any claim or liability other than from fire shall arise from the joint or concurring negligence of the parties hereto (or of any two or more of them if there be more than two), it shall be borne equally by the parties at fault."

Bridal Veil answered the Union Pacific complaint denying that there was any negligence on its part. At a pretrial conference a pretrial order was formalized setting forth the issues and contentions of the parties, the order providing that the order superseded the pleadings. The trial court chose to submit the case to the jury without any general verdict, using a special verdict with a number of interrogatories.

It seems appropriate here to set forth the interrogatories submitted to the jury and its answers as follows:

"**Section I.** Was the defendant, Bridal Veil Lumber Company, or any of its employees, negligent in any of the following respects:

1. In failing to keep the hyster under control?
   Answer—No.
2. In failing to keep a proper lookout for the railroad cars?
   Answer—......"

(Note: On this question the jury failed to agree, dividing six to six.)

"3. In failing to equip the hyster with brakes

adequate to control its operation under the conditions then existing?

Answer—No."

4. In failing to apply the hyster brakes properly?

Answer—No.

5. In permitting the hyster to come down the ramp and collide with the railroad car?

Answer—No.

6. In turning the hyster so as to collide with the railroad car?

Answer—No.

7. In violating any agreement that may have been made to the effect that defendant would refrain from using the crossing while the switching was being done?

Answer—No.

Section II. If you find that the defendant, Bridal Veil Lumber Company, was negligent in any of the respects mentioned in Section I, did such negligence cause, or contribute directly to, the accident and the resultant injury to Daniel W. Fagan?

(Note: Not answered.)

"Section III. Was the plaintiff, Union Pacific Railroad Company, or its employees, negligent in any of the following respects?

1. In failing to station a watchman at the ramp crossing?

Answer—No.

2. In failing to ring the bell upon approaching the ramp crossing?

Answer—No.

3. In failing to sound the whistle upon approaching the ramp crossing?

Answer—Yes.

4. In moving said cars at an excessive speed as they approached the point of the collision?

Answer—Yes.

5. In failing to have a flagman preceding the switching operation?

Answer—Yes.

6. In failing to give any warning of its approach to the crossing?

Answer—Yes.

7. In failing to have the locomotive under control?

Answer—Yes.

8. In failing to supervise properly the movement of the cars?

Answer—Yes.

Section IV. If you find that plaintiff, Union Pacific Railroad Company, was negligent in any of the respects mentioned in Section III, did such negligence cause, or directly contribute to, the accident and the resultant injury to Daniel W. Fagan?

Answer—Yes."

Using the interrogatory answers as a basis, the trial court entered findings of fact, conclusions of law and

a judgment. It absolved Bridal Veil of all culpable negligence. As that court construed the lease and the industry track agreement, it necessarily held that without negligence of Bridal Veil there was no liability on its part under either agreement.

There are some cogent arguments that under the lease Bridal Veil became an insurer of Union Pacific against any liability that would not have occurred "but for" Bridal Veil being on the plant site. Also, Union Pacific can point out that the renewal lease is subsequent in time to the date of the industry track contract and therefore may argue that the later document should control.

However, this court believes that the most important factor or rule that should dominate construction here is that the indemnity provisions of the lease are in their nature general for the whole plant site[1]—while the track contract specifically deals with the operation of the track and goings-on about it. Therefore, this court lays the lease to one side and holds that whatever rights Union Pacific has over against Bridal Veil are under the track contract, the specific prevailing over the general.

At this point, it is well to allude to the fact that the same indemnity clause of the Union Pacific track con-

[1]It is assumed for discussion, without knowing, that the lease of the plant site covers the land on which the track is laid.

tract was before this court four years ago in **Booth-Kelly Lumber Co. v. Southern Pacific Co.,** 183 F. 2d 902. Reference is made to that decision. The applicability and interpretation of the clause will be dealt with herein after consideration of the jury's verdict and the trial court's subsequent action thereon. In passing, it may be noted that in **Booth-Kelly** no jury was involved and it was much easier for the trial court to make its findings and point up the issues of the case without the embarrassment of one important question being unanswered by the jury in disagreement upon it.

Much of the claim of error below revolves around this instruction given by the trial court:

> "Now I want to make a comment on the evidence and, as I told you before, this is only my opinion and you can accept it or reject it, as you see fit.
>
> A railroad crossing is a place of danger, whether it is a public crossing or, as in this case, a private crossing. And the operator of a motor vehicle, such as a hyster, should look and listen before attempting to cross a railroad track.
>
> At a public crossing the railroad has the right of way. That, in my opinion, means that as between a train and a motor vehicle the train has the right to use the track in preference to a motor vehicle.
>
> At a private crossing I believe that the railroad should likewise have the right of way.

That is the extent of my comment on the evidence and, as I told you before, you can accept it or reject it."

Elsewhere in its general instructions the trial court instructed the jury that the hyster operator was under the duty "to keep such a lookout as would permit him to avoid accident in the exercise of reasonable care."

The following observations are made concerning the "comment" and the general instrctions.

1. The trial judge twice in the comment has advised the jury it needs pay no attention to him. And this is in addition to a prefatory statement that when he expresses his opinion the jury is not bound by any such statement. In commenting on the evidence, a trial judge should make it clear that the jury is not bound by his opinion. But too much diffidence in the matter can lead to a jury thinking that the trial judge is issuing an invitation to pay no attention to him.

2. If the evidence which was brought up shows that the spur parallels the main line and that the spur is frequently used, then the court probably should instruct the jury that the switching train has the right of way.

3. The general instruction on lookout given elsewhere in the instructions to the effect that the hyster operator should "keep such a lookout as would permit him to avoid accident in the exercise of reasonable

care" is correct. The severities of **Baltimore & Ohio v. Goodman,** 275 U.S. 66 have been relaxed or restricted to its particular facts. **Pokora v. Wabash Ry. Co.,** 292 U.S. 98. It would not seem that the hyster operator was obligated to run down the ramp on foot and take a look down the track before proceeding down the ramp with Bridal Veil's hyster and across the track. It was a jury question to determine under the circumstances how much looking-out the hyster operator should have done and whether he did enough. The trial judge was entitled to express his opinion as such as to how much "looking-out" the hyster man should have done and whether he had done enough, but it would be better to handle the **duty** to "lookout" as a matter of law

4. The comment on the evidence intertwines matters of law into the comment in such a way that law and opinion are not sharply differentiated. And the comment instruction has a possible interpretation that the jury need not pay any attention to matters of law therein stated, as distinct from the judge's opinion on the evidence. (Both parties appropriately excepted to the instruction.)

5. The court, however, would not reverse the case on this instruction believing on the whole that the jury was well instructed; at least, if error there was, it was not substantial. But on a retrial the instruction, if given

again, should be modified in the light of what has been herein said.

Coming to the unanswered question concerning Bridal Veil on which the jury evenly divided, the court felt justified in going ahead and making findings and entering judgment. Repeating, that question was as follows:

> "Was the defendant, Bridal Veil Lumber Company, or any of its employees, negligent in failing to keep a proper lookout for the railroad cars?"

Arguments are made by appellee that the court did not need to resubmit the question to another jury. It says:

1. An answer to this question will be presumed which is consistent with the other answers of the jury; that the jury exculpated Bridal Veil on all other points and, therefore, a "no" answer should be read into this question.

2. The question is really answered by the answers to the other questions.

3. The plaintiff somehow is to blame for not insisting that the jury be sent back for further deliberation.

The foregoing points are not quoted literally, but it is believed a fair summary has been made.

It is true that Rule 49(a) of the Rules of Civil Procedure has eliminated many of the inherent dangers

of special verdicts consisting solely of answers to interrogatories unaccompanied by a general verdict. For example, no longer can a party failing to request the submission of a question to a jury later complain of the absence of the question.

But to say "49(a)" has improved the usability of the special verdict is not to say the special verdict no longer has pitfalls. In submitting the special verdict, the trial court, in essence, told the jury to answer all questions upon which it could agree unanimously and not to answer those it could not agree upon. That is a statement of the obvious and initially is about as far as the trial judge needs to go. But when the jury is in disagreement as to one question, when it is readily apparent that the failure to answer one question is not an oversight, and it is apparent the disagreement has lasted for some time, it is peculiarly the function of the trial judge to decide whether to discharge the jury or, within the limits of legitimate wheedling, try to get the jurors to agree on an answer. It may be assumed that counsel for Union Pacific, outside the presence of the jury, could have made a request to the court that the jury be returned to its room for further deliberation; yet under the circumstances it cannot be said that a failure to make such a request was the waiver of a right. Cases on the right to poll a jury being waived by failure to so

request do not seem apposite. Such a right is one peculiar to the parties. How long a jury should be kept together when it has failed to agree is peculiarly the business of the court. Requests from counsel may not be inappropriate. But certainly little duty rests upon counsel in this respect.[2]

To this court, it seems that the disagreement of the jury on one vital question left a gaping hole in the special verdict. Though it can be argued that other questions necessarily implied the element of keeping a proper lookout, it is obvious in submitting the question of lookout the trial judge thought it meant something different and apart from the other questions. And the jury's failure to agree on "lookout" buttresses this conclusion and shows it must not have included "lookout" as a factor in the other questions. Therefore, the conclusion is that it was error in the face of the unanswered question for the trial court to thereafter "go it alone" and dispose of the case. In view of this, the judgment must be reversed for a new trial. To do other than send the case back for a new trial when decision on a vital issue by the jury is missing would deprive the parties of the jury trial to which they are entitled constitutionally.

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[2]What is said here, of course, would not be appropriate in the case where a jury from oversight did not fill in a blank in a verdict. Also, it might not be appropriate where the jury mistakenly determined that it did not need to answer a question. In such cases, any party having knowledge of the deficiency might be deemed to have waived jury trial on a given question by not insisting on jury trial thereof.

Returning to the construction of the track contract clause on indemnity, it is difficult to anticipate all situations, not knowing what the jury will eventually decide. The opinion in **Booth-Kelly,** supra, sets forth this court's construction of the indemnity clauses common to the Southern Pacific contract in that case and to Union Pacific here. Following that case it is here held that the rights of indemnity, if any, must be found in the contract which supersedes the common law of Oregon (insofar as the contract contravenes it) by specifically dealing with the subject. It is also here held that that contract being for service that the railroad as a common carrier is not required to give, the contract is not void as against public policy.

In **Booth-Kelly,** this court, addressing itself to that portion of the clause which read:

> "Industry also agrees to indemnify and hold harmless Railroad for loss, damage, injury or death from any act or omission of Industry, its employees or agents, to the person or property of the parties hereto and their employees, and to the person or property of any other person or corporation, while on or about said Track. . . ."

held that the clause was to be interpreted as having been written in the light of the common law and that this much of the clause was intended to cover the same

ground as Section 995 of the Restatement of the Law of Restitution which reads as follows:

> "Where a person has become liable with another for harm caused to a third person because of his negligent failure to make safe a dangerous condition of land or chattels, which was created by the misconduct of the other or which, as between the two, it is the other's duty to make safe, he is entitled to restitution from the other for expenditures properly made in the discharge of such liability, unless after discovery of the danger, he acquiesced in the continuation of the condition."[3]

That portion of the clause which reads as follows:

> ". . . . and if any claim or liability, other than from fire, shall arise from the joint or concurring negligence of both parties hereto, it shall be borne by them equally."

was held to apply to the factual situation of **Union Stockyards Co. of Omaha v. Chicago B. & Q. R. Co.,** 196 U.S. 217; and to modify for the contracting parties Section 102 of the Restatement of Law of Restitution which reads as follows:

> "Where two persons acting independently or jointly, have negligently injured a third person or his property for which injury both become liable in tort to the third person, one of them who has made ex-

[3]This rule is followed in **Washington Gas Light Co. v. District of Columbia,** 161 U.S. 316, 16 S. Ct. 564, 40 L. Ed. 712 and **City of Astoria v. Astoria & C. RR Co.,** 67 Ore. 538, 136 P. 645.

penditures in the discharge of their liability is not entitled to contribution from the other."

Sub silentio, the import of **Booth-Kelly** is surely that Bridal Veil, as between it and Union Pacific in a situation where both were actors, is not to be held to contribute or indemnify absent negligence on its part or on the part of its servants which is a contributing cause of the accident.

If the answers of the jury should eventuate that the court could conclude therefrom that both Union Pacific and Bridal Veil were both primarily or actively negligent, then Booth-Kelly indicates that Bridal Veil should contribute one-half. If the answers indicate primary or active negligence on the part of Bridal Veil and no negligence or passive or secondary negligence on the part of Union Pacific then the railroad would be entitled to full indemnity. Vice versa, with no negligence or passive or secondary negligence on the part of Union Pacific there would be no recovery over against Bridal Veil.

In sum, in this court's view the entire clause of the track contract enunciates the common law on indemnity and contribution except where the parties are in pari delicto under Section 95, Restatement of Law of Restitution; then they divide the loss equally.

This court should be and is reluctant to hold the

track contract one of insurance. If that was actually intended it would be easy to say so in unmistakable language in the contract. It is possible that the railroad sincerely feeling that the hyster operator was the one wholly to blame turns to contract construction and comes up with a result that the contract is one of insurance. But if the contract were spelled out as one of insurance then you might find the shippers hiring trucks instead of railroad cars.

It is not for this court to draw the questions for the jury, but it may be observed that possible combinations of answers in the set of questions used upon the trial in the district court may still leave something beyond clerical work for the trial judge in framing findings or a judgment. It still may be his question and his alone under certain possible answers to the questions to determine which category of liability the parties are in.

It would seem appropriate here that all issues be retried. The judgment is reversed for further proceedings consistent with the opinion herein.

(Endorsed:) Opinion. Filed Jan. 3, 1955.

Paul P. O'Brien, Clerk.

APPENDIX "C"

United States Court of Appeals
for the Ninth Circuit

UNION PACIFIC RAILROAD COMPANY, Appellant,
vs.
BRIDAL VEIL LUMBER COMPANY, Appellee.

No. 13,879
March 8, 1955

On Petition for Rehearing

Before: HEALY, POPE, and CHAMBERS, Circuit Judges

CHAMBERS, Circuit Judge

Reference is made to the opinion of this court rendered on January 3, 1955, and reported in ....F. 2d.....

This court has reversed the judgment below and directed a new trial. Now Bridal Veil, appellee, and defendant in the trial court, moves for a rehearing. The motion for rehearing is denied.

Two of appellee's points on the motion for rehearing, however, should be noticed. This court, in its decision, has held that the failure of the jury to answer one special interrogatory left too big a hole in the verdict of the jury for the trial court to proceed on to judgment. Bridal Veil now says that there was no evidence for the case to go to the jury on the question which the jury

failed to answer. Neither party brought to this court a transcript of the testimony heard at the trial.

In the absence of a record of the testimony, this court assumes that the evidence supports a complete verdict. **Bernards v. Johnson,** 9 Cir., 103 F. 2d 567; **Rickard v. Thompson,** 9 Cir. 72 F. 2d 807. It is a necessary corollary that in the absence of a record it must be assumed that there was sufficient evidence in the testimony to justify a trial judge in submitting any given interrogatory within the issues of a case. If the failure of the jury to agree on one vital interrogatory actually was harmless error, appellee could have demonstrated the fact by including the testimony in the transcript of proceedings.

The appellee complains bitterly of the necessity of proving Union Pacific's negligence again. This is required by the decision herein. (Each party has made issues that the other was negligent.) But really one single event is involved. It does not appear appropriate in such a case to let one jury look at one side of the occurrence and a second jury look at the other side of the same incident.

(Endorsed:) Opinion on Petition for Rehearing. Filed March 8, 1955.

Paul P. O'Brien, Clerk.

APPENDIX "D"

In the District Court of the United States
For the District of Oregon

Civil Action No. 4395

UNION PACIFIC RAILROAD COMPANY, a corporation, Plaintiff,

vs.

BRIDAL VEIL LUMBER COMPANY, a corporation, Defendant.

VERDICT

We, the jury, duly empanelled and sworn to try the above-entitled cause, make the following answers to the special interrogatories submitted to us, with respect to the accident which occurred on or about March 14, 1946, when a hyster operated by defendant collided with a string of cars then being switched by plaintiff at Bridal Veil, Oregon, causing injury to plaintiff's employee Daniel W. Fagan:

Section I—Was the defendant, Bridal Veil Lumber Company, or any of its employees, negligent in any of the following respects:

(1) In failing to keep the hyster under proper control? Answer: No.

(2) In failing to keep a proper lookout for the railroad cars? Answer .....

(3) In failing to equip the hyster with brakes adequate to control its operation under the conditions then existing? Answer: No.

(4) In failing to apply the hyster brakes properly? Answer: No.

(5) In permitting the hyster to come down the ramp and collide with the railroad car? Answer: No.

(6) In turning the hyster so as to collide with the railroad car? Answer: No.

(7) In violating any agreement that may have been made to the effect that defendant would refrain from using the crossing while the switching was being done? Answer: No.

Section II—If you find that the defendant, Bridal Veil Lumber Company, was negligent in any of the respects mentioned in Section I, did such negligence cause, or contribute directly to, the accident and the resultant injury to Daniel W. Fagan? Answer .....

Section III—Was the plaintiff, Union Pacific Railroad Company, or its employees, negligent in any of the following respects?

(1) In failing to station a watchman at the ramp crossing? Answer: No.

(2) In failing to ring the bell upon approaching the ramp crossing? Answer: No.

(3) In failing to sound the whistle upon approaching the ramp crossing? Answer: Yes.

(4) In moving said cars at an excessive speed as they approached the point of the collision? Answer: Yes.

(5) In failing to have a flagman preceding the switching operation? Answer: Yes.

(6) In failing to give any warning of its approach to the crossing? Answer: Yes.

(7) In failing to have the locomotive under control? Answer: Yes.

(8) In failing to slow down or stop in an effort to avoid the collision? Answer: No.

(9) In failing to supervise properly the movement of the cars? Answer: Yes.

Section IV—If you find that plaintiff, Union Pacific Railroad Company, was negligent in any of the respects mentioned in Section III, did such negligence cause, or directly contribute to, the accident and the resultant injury of Daniel W. Fagan? Answer: Yes.

Done at Portland, Oregon, this 24th day of January, 1950.

/s/ W. R. GABELMAN,
Foreman.

(Endorsed): Filed March 29, 1951.